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CRIMINAL LAW ISSUES

POYNTER v. STATE, No. 57S03-0010-CR-595, ___ N.E.2d ___ (Ind. June 21, 2001).
DICKSON, J.

Following a bench trial at which the defendant was not represented by counsel, he was convicted of battery on a police officer [footnote omitted] and resisting arrest. [Footnote omitted.] He appealed his convictions claiming a violation of his right to assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1 Section 13 of the Indiana Constitution. The Court of Appeals reversed. Poynter v. State, 733 N.E.2d 500 (Ind. Ct. App. 2000). We granted the State's petition for transfer which alleged that this decision is inconsistent with other decisions of this Court and the Court of Appeals.

. . . .

At the defendant's initial hearing on January 5, 1999, the defendant entered a plea of not guilty and his surety bond was posted. He was given and signed a standard advisement of rights form that included the "right to be represented by and to consult with a lawyer" and "the right to have the court appoint an attorney to represent you at no cost if found to be indigent." [Citation to Record omitted.] After informing the defendant of the charges against him and the possible penalties should he be found guilty, the judge asked the defendant if he had read and understood the rights on the form and whether he was going to be hiring an attorney to represent him. The defendant answered "Yes, Sir" to each of these questions. [Citation to Record omitted.] The court scheduled a pretrial conference for February 22, 1999, and advised the defendant "you're required to be back here at that time with your attorney." [Citation to Record omitted.] On that date, however, the conference was continued to April 19, 1999, by agreement of the parties "so that defendant

can obtain an attorney." [Citation to Record omitted.] At the April pretrial conference, the defendant appeared without an attorney. The hearing consisted of the following colloquy:

> The Court: This is in 9901-CM-007 and also 9709-CM-851. State of Indiana versus Barry S. Poynter. Mr. Poynter, what's your address?
> Mr. Poynter: I live with friends right now. I really ain't got a place of my own.
> . . . .
> The Court: Are you going to be hiring an attorney to represent you in these cases?
> Mr. Poynter: Well I was, but I've been working like seven (7) days a week, last week twelve (12) hours a day, and I've been really tired, and I ain't been getting up on time and walking down there and talk to them. I got some money saved up though for a lawyer, but I ain't got, went down there and talked to one.

The Court: Well, I will set these cases for bench trial and fact-finding hearing on June 21st at 10:45. If you decide that you want to get up to go down and hire an attorney –
Mr. Poynter: I got to sometime.
The Court: (continuing) You can do that. Otherwise you need to be here June 21st at 10:45, prepared for a trial in these cases. And a trial on the probation violation.
Mr. Poynter: Okay.
The Court: So with or without an attorney you need to be prepared for a trial on this date.
Mr. Poynter: I'll be here.
The Court: Okay.
. . . .

[Citation to Record omitted.]

On the date set for his bench trial, June 21, 1999, the defendant appeared in person, and the trial proceeded on the two class A misdemeanor charges. Neither the trial judge nor the parties commented regarding the absence of an attorney for the defendant. . . .

. . . .

Several courts have held . . . that a verbal waiver of the right to counsel may not be necessary "so long as the . . . court has given a defendant sufficient opportunity to retain the assistance of … counsel, defendant's actions which have the effect of depriving himself of . . . counsel will establish a knowing and intentional choice." United States v. Hoskins, 243 F.3d 407, 410 (7th Cir. 2001)(finding defendant's conduct to be sufficient to imply waiver, and that trial court's inquiry was sufficient and provided explicit warning of consequences of continued conduct); s*ee also* United States v. Irorere, 228 F.3d 816, 828 (7th Cir. 2000)(holding that defendant waived right to counsel by his conduct where court appointed four separate lawyers all of whom either requested to withdraw or were fired by the defendant); United States v. Kneeland, 148 F.3d 6, 11 (1st Cir. 1998)(finding valid waiver when defendant discharged third appointed counsel after explicit warning that fourth counsel would not be appointed); United States v. Bauer, 956 F.2d 693, 695 (7th Cir. 1992)(finding valid waiver when defendant failed to retain counsel after court determined that defendant had financial ability to do so); United States v. Weninger, 624 F.2d 163, 167 (10th Cir. 1980)(inferring waiver from defendant's "stubborn refusal" to retain counsel despite repeated urging by judge). In each of these waiver-by-conduct cases, however, the courts recognized that, just like an express verbal waiver, an implied waiver is not valid absent a finding under the totality of the circumstances that the waiver is knowing and intelligent; and this finding invariably included evidence of an admonition to the defendant on the dangers and disadvantages of self-representation. [Citations omitted.]

This Court addressed the issue of a defendant's conduct as waiving the right to counsel in Houston v. State, 553 N.E.2d 117 (Ind. 1990), and Fitzgerald v. State, 254 Ind. 39, 257 N.E.2d 305 (Ind. 1970). . . .

The facts in Fitzgerald and Houston do not easily support their differing outcomes. In both cases we found that the defendant's conduct appeared to constitute determined effort to manipulate and obstruct the trial process. [Citations omitted.] The Fitzgerald court held that even though the trial judge had "made every effort to treat appellant justly and to insure that he was aware of his rights and obligations with regard to his upcoming trial," it was error for the court to try the defendant without an attorney without a clear waiver. [Citation omitted.] The Houston court determined that the trial court "clearly presented to appellant his choices of proceeding with or without counsel and appellant chose the latter," and thus his waiver was knowing and intelligent. [Citation omitted.] In neither case was an admonition given. The outcomes of these cases leave us with inconsistent precedent, and we take this opportunity to clarify.

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While the Supreme Court has not elaborated with more specific considerations when determining a knowing and intelligent waiver, the federal Circuit Courts of Appeals have. [Footnote omitted.] The Seventh Circuit Court of Appeals considers four factors: "(1) the extent of the court's inquiry into the defendant's decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the background and experience of the defendant, and (4) the context of the defendant's decision to proceed *pro se*." [Footnote omitted.] Hoskins, 243 F.3d at 410. When applying these factors the court notes

> The district court is in the best position to assess whether a defendant has knowingly and intelligently waived counsel, and we will most likely uphold the trial judge's decision to honor or deny the defendant's request to represent himself where the judge has made the proper inquiries and conveyed the proper information, and reaches a reasoned conclusion about the defendant's understanding of his rights and voluntariness of his decision.

[Citation omitted.] . . .

Considering these factors within the circumstances of the present case we find that the trial court, while it did determine that the defendant was advised of his trial rights [footnote omitted] and did tell the defendant of the procedural outcome if he failed to secure counsel, did not at any time advise the defendant on the dangers and disadvantages of self-representation. This lack of any advisement weighs heavily against finding a knowing and intelligent waiver. We can find nothing in the record that either directly or inferentially supports the notion that the defendant may have independently understood the dangers and disadvantages of self-representation. The defendant had prior misdemeanors, but it is not known whether these prior offenses resulted in trials or pleas or what sentences were received. The defendant's background and experience—twenty-five years old, ninth grade education, employed—tilts us neither towards finding or not finding waiver. Finally, while there is evidence that the defendant chose to work and sleep rather than take the time to hire an attorney, his conduct did not result in gross delays or clearly appear to intend manipulation of the process. The facts and circumstances of this particular case do not warrant finding a knowing and intelligent waiver.

Trial courts need not necessarily appoint counsel for every defendant who fails to implement an intention to employ counsel, nor need they unreasonably indulge a defendant who repeatedly fails to cooperate with appointed counsel, but the importance of the right to counsel cautions that trial courts should at a minimum reasonably inform such defendants of the dangers and disadvantages of proceeding without counsel. . . .

. . . .

SHEPARD, C. J., and BOEHM, RUCKER, and SULLIVAN, JJ., concurred.

LANDIS v. STATE, No. 64S05-0010-PC-570, ___ N.E.2d ___ (Ind. June 26, 2001).

SULLIVAN, J.

Reading both Woods [v. State, 701 N.E.2d 1208 (Ind. 1998), cert. denied, 528 U.S. 861 (1991)] and McIntire [v. State, 717 N.E.2d 96 (Ind. 1999)] together, and reading McIntire in context, yield these conclusions: first, there was no clear precedent prior to Woods as to whether an available claim of ineffective assistance of counsel was required to be litigated on direct appeal; second, Woods held that such claims could be litigated in post-conviction proceedings if (but only if) they were not litigated on direct appeal; third, because appellate counsel in McIntire included a claim of ineffective assistance of counsel in a direct appeal filed before Woods was decided, we declined to address the claim, thereby preserving it for post-conviction proceedings. As can be readily seen by these three

conclusions, they do not provide any basis for holding that the failure to litigate a claim of ineffective assistance of counsel in a direct appeal decided before Woods precludes a petitioner from seeking post-conviction relief on that basis.

Because the state of the law on this subject was unclear prior to Woods, it was and is our intent that the failure to litigate a claim of ineffective assistance of counsel in a direct appeal does not preclude a petitioner from seeking post-conviction relief on that basis, irrespective of whether the direct appeal preceded the Woods decision. We do observe, however, that if a claim of ineffective assistance of counsel has been litigated on direct appeal, it is not available in post-conviction proceedings, again irrespective of whether the direct appeal preceded the Woods decision. See Woods, 701 N.E.2d at 1220 ("The defendant must decide the forum for adjudication of the issue -- direct appeal or collateral review. The specific contentions supporting the claim, however, may not be divided between the two proceedings.") The law on this point was clear prior to Woods. See, e.g., Sawyer v. State, 679 N.E.2d 1328 (Ind. 1997); Morris v. State, 466 N.E.2d 13 (Ind. 1984).

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and RUCKER, JJ., concurred.

SANCHEZ v. STATE, No. 92S03-0009-CR-518, ___ N.E.2d ___ (Ind. June 26, 2001).

We hold that Indiana Code section 35-41-2-5, prohibiting the use of evidence of voluntary intoxication to negate the mens rea requirement in criminal cases, does not violate the Indiana Constitution.

. . . .

At trial, the trial court gave the following instruction over Sanchez's objection: "Voluntary intoxication is not a defense to the charge of Rape and Confinement. You may not take voluntary intoxication into consideration in determining whether the Defendant acted knowingly or intentionally, as alleged in the information." This instruction accurately reflects Indiana law, effective July 1, 1997, as codified in Indiana Code section 35-41-2-5. Pub. L. No. 210-1997, § 3, 1997 Ind. Acts 2938. A jury convicted Sanchez of rape and criminal confinement and he was sentenced to forty years imprisonment.

On appeal, Sanchez argues that it was error to give the voluntary intoxication instruction because the Due Course of Law provision of the Indiana Constitution and several other state constitutional provisions establish his right to present a voluntary intoxication defense. The Court of Appeals, after an extensive examination of the origin of Article I, Section 12 and the history of intoxication as a defense, found that Sanchez had provided no independent analysis supporting a due course of law claim under the Indiana Constitution, and therefore evaluated this issue under federal due process doctrine. Sanchez v. State, 732 N.E.2d 165, 173 (Ind. Ct. App. 2000). The Court of Appeals found Montana v. Egelhoff, 518 U.S. 37 (1996), dispositive. The court concluded that there was no federal due process violation because, in the terms of the plurality opinion in Egelhoff,

prohibiting evidence of intoxication did not offend "a principle of justice so rooted in the traditions and conscience of our people so as to be ranked fundamental." Sanchez, 732 N.E.2d at 173.

. . . .

For all of the foregoing reasons, we think constitutional rights not grounded in a specific constitutional provision should not be readily discovered. Specifically, we do not agree with the Sills [v. State, 463 N.E.2d 228 (Ind. 1984), overruled on other grounds by Wright v. State, 658 N.E.2d 563, 569-70 (Ind. 1995)] concurrence, cited with approval in Terry [v. State, 465 N.E.2d 1085 (Ind. 1984)], to the extent it takes the view that intent is a constitutionally required element of every crime. To support that view, the concurrence in Sills explains the case law supporting strict criminal liability as in reality finding an "implied

intent." 463 N.E.2d at 241. . . . We think it is more candid to acknowledge, as Smith holds, that some crimes do not have a mens rea component, rather than to contend that intent is always required, but may be implied if necessary. [Citation omitted.]

We do agree that a crime requires some voluntary action, and perhaps that is all Terry and Sills address. . . .

. . . The Indiana intoxication statute eliminates the requirement that the voluntarily intoxicated defendant acted "knowingly" or "intentionally" as to those crimes that include those elements. [Footnote omitted.] But even if there may be an act rendered involuntary by intoxication, itself a doubtful premise in most circumstances, the legislature has decreed that the intoxication, if voluntary, supplies the general requirement of a voluntary act. That is sufficient to place the voluntarily intoxicated offender at risk for the consequences of his actions, even if it is claimed that the capacity has been obliterated to achieve the otherwise requisite mental state for a specific crime.

The concurrence contends that the need for voluntary acts cannot be supplied by voluntary intoxication. . . . It may be unwise to impose strict liability for actions taken by voluntarily intoxicated persons. But the issue before us is whether the legislature has so provided, and, if so, whether it is unconstitutional. . . .

Providing that a voluntarily intoxicated person is responsible for his or her actions to the same degree as a sober person does not criminalize activity that is wholly innocent because of ignorance of an obscure law or lack of knowledge of relevant facts. Rather, it substitutes an element of voluntary intoxication to the point that a person can claim ignorance of his own actions for the mens rea otherwise required as to the wrongful conduct itself. In this respect, it is similar to felony murder, which accepts the mens rea of the underlying felony as sufficient for murder. Both involve attaching more serious penal consequences to an activity that the legislature may view as reprehensible in itself if it produces greater harm than it typically does. . . .

. . . We think the legislature had conventional crimes—murder, battery, rape, and so forth—in mind when it provided that voluntary intoxication does not negate the mens rea element. So applied, that treatment of intoxication does not criminalize activity that ordinary citizens would consider benign. Rather, it supplements the "knowing" and "intentional" elements with a third condition. The statute acts qualitatively the same as felony murder, and both are constitutional forms of strict liability. . . .

. . . Assuming intoxication has both rendered a person incapable of apprehending the consequences or wrongfulness of his acts and still left him capable of performing them, we think the legislature may constitutionally provide that the perpetrator whose ignorance is the product of self-induced intoxication rather than moral blindness is equally culpable. . . .

. . . Because we conclude that a statute may properly impose criminal liability for some actions without a mens rea element, the question becomes whether the statute before us does that. We think Montana v. Egelhoff, 518 U.S. 37 (1996), is instructive on that point.

. . .

. . . .

Unlike the Montana Supreme Court, we read the Indiana statute as redefining the elements of crimes, and not as excluding relevant evidence. As a matter of form, the statute does not speak in terms of admissible evidence. It was added to the Indiana Code as a new section for Chapter 35-41-2, which is entitled "Basis of Criminal Liability," itself a part of Article 35-41, entitled "Substantive Criminal Provisions." . . . Because we view the voluntary intoxication statute as defining the elements of crimes in this state, we do not find it offensive to either the federal due process clause or any notion of fundamental fairness embedded in our state constitution.

Because the statute does not "exclude relevant evidence," it does not necessarily proscribe evidence of the defendant's use of alcohol or drugs. Rather, as occurred in this case, this evidence may be admissible as general background, [footnote omitted] or as relevant to something other than lack of mens rea, e.g., identity. Perhaps it may also be relevant to a claim of accident under other circumstances. But none of these issues are raised here. This is not to say, as the concurrence contends, that other rules of evidence, specifically, Indiana Rule of Evidence 404(b), may not preclude use of this evidence if the defense objects. To the contrary, Swanson v. State, 666 N.E.2d 397, 398-99 (Ind. 1996), cited by the concurrence, holds that Rule 404(b) may preclude evidence of other "bad acts." We think this holding is fully consistent with our ruling today. Here, evidence of defendant's intoxication was admitted and embraced by the defendant. If such evidence is admitted, the instruction given by the trial court is proper. Moreover, the trial court may properly exclude evidence of blood alcohol content, as was done in this case, if it finds that it bears solely on the degree of intoxication.

. . . .

In sum, we agree with the concurrence that the State is obligated to prove all elements of a crime. And we agree that a defendant has a right to present relevant evidence to negate an element of any charged offense. But we disagree with the concurrence that the voluntary intoxication statute denies this right. The statute redefines the requirement of mens rea to include voluntary intoxication, in addition to the traditional mental states, i.e., intentionally, knowingly, and recklessly. Thus, evidence of voluntary intoxication does not negate the mens rea requirement, as the concurrence contends. Rather, it satisfies this element of the crime.

. . . .

SHEPARD, C. J., and DICKSON, J., concurred.

SULLIVAN, J., filed a separate written opinion in which he concurred in the result and in which RUCKER, J., joined, in part as follows:

Nearly seventeen years ago, this Court determined in Terry v. State that a criminal defendant has a constitutional right to introduce evidence of intoxication to negate an element of an offense charged by the State. [Citation omitted.] . . .

The majority opinion overrules Terry. I think this is wrong.

. . . .

Exceedingly persuasive arguments must be set out for us to turn our back on such established law. [Citation omitted.] . . .

. . . .

Even if a mens rea element is not constitutionally required as a matter of substantive constitutional law, the rule that Terry set out – which pertains solely to the presentation of evidence – has been vindicated by the procedural aspects of this court's and the United States Supreme Court's criminal law jurisprudence. [Citation omitted.] . . . Therefore, while the legislature is free to define the elements of crimes, it was not free to override the rule of constitutional criminal procedure that Terry pronounced.

Terry is not alone in this position. Several older Indiana cases suggest that criminal defendants have a right to present evidence to rebut the State's case on a mens rea element. . . .

. . . .

[T]he majority's opinion gives the legislature carte blanch to eliminate a defendant's right to present evidence in other circumstances on the theory that it is merely "defining elements." This is perhaps the most disturbing aspect of today's holding.

. . . .

I concur in the result because I am convinced that the trial court's error was harmless beyond a reasonable doubt. The State proved beyond a reasonable doubt that Defendant was not so intoxicated that he was incapable of forming the intent required by the statute. . . .

SEGURA v. STATE, No. 10S01-0009-PC-515, ___ N.E.2d ___ (Ind. June 26, 2001).
BOEHM, J.

Jose Daniel Segura pleaded guilty to dealing in cocaine. He appeals the denial of his successive petition for postconviction relief, raising one issue: whether his trial counsel was ineffective for failing to inform him of the possibility of deportation if he pleaded guilty. In State v. Van Cleave, 674 N.E.2d 1293, 1306 (Ind. 1996), we held that in order to upset a conviction based on a claim of ineffective assistance of counsel, a petitioner who pleads guilty must show a reasonable probability that he would not have been convicted if he had gone to trial. We hold today that the United States Supreme Court's recent decision in Williams v. Taylor, 529 U.S. 362 (2000), does not affect the Van Cleave standard for evaluating ineffective assistance of counsel claims as to errors or omissions of counsel that overlook or impair a defense. As to those claims, we remain of the view that in order to establish that the guilty plea would not have been entered if counsel had performed adequately, the petitioner must show that a defense was overlooked or impaired and that the defense would likely have changed the outcome of the proceeding. Similarly, if counsel's shortcomings are claimed to have resulted in a lost opportunity to mitigate the penalty, in order to obtain a new sentencing hearing, the petitioner must show a reasonable probability that the oversight would have affected the sentence.

This case presents a claim that counsel's incorrect advice as to the penal consequences led the petitioner to plead guilty when he otherwise would not have done so. However, this is not a claim that, through erroneous advice, a sentence less than the potential maximum was promised or predicted to induce a plea. Rather, the claim is that the maximum was misdescribed by trial counsel. This error in advice would have weighed equally in the calculation of the consequences of conviction after trial and conviction after a plea. As to such a claim, we conclude that a finding of prejudice requires evidence demonstrating a reasonable probability that the erroneous or omitted advice materially affected the decision to plead guilty.

. . . .

. . . Because Segura alleges prejudice from advice as to deportation, we must decide as a threshold issue whether a failure to counsel about the possibility of deportation constitutes deficient performance as required under Hill. There is a split of authority on this point. The majority of federal circuit courts hold that, as a matter of law, failure to advise of

the prospect of deportation as a result of conviction is not deficient performance by counsel in connection with a guilty plea. [Citations omitted.]

The question has never been addressed by this Court, but the Indiana Court of Appeals has held that "the consequence of deportation, whether labeled collateral or not, is of sufficient seriousness that it constitutes ineffective assistance for an attorney to fail to advise a noncitizen defendant of the deportation consequences of a guilty plea." Williams v. State, 641 N.E.2d 44, 49 (Ind. Ct. App. 1994). We agree with the Court of Appeals that the failure to advise of the consequence of deportation can, under some circumstances, constitute deficient performance. Otherwise stated, we cannot say that this failure as a matter of law never constitutes deficient performance. Whether it is deficient in a given case is fact sensitive and turns on a number of factors. These presumably include the

knowledge of the lawyer of the client's status as an alien, the client's familiarity with the consequences of conviction, the severity of criminal penal consequences, and the likely subsequent effects of deportation. Other factors undoubtedly will be relevant in given circumstances. . . .

. . . .

DICKSON and RUCKER, JJ., concurred.

SULLIVAN, J., filed a separate written opinion in which he concurred with the result and in which SHEPARD, C. J., joined, in part, as follows:

I part company from the majority when it adopts a different, more lenient, standard for prejudice with respect to claims arising from counsel's legal advice with respect to penal consequences. For these claims, the majority would not require a showing that, if the defendant had gone to trial, there would have been a reasonable probability of a more favorable result. It is enough, in such circumstances, the majority says, for the defendant to show merely that a "hypothetical reasonable defendant" would not have plead guilty and insisted on going to trial. I would require a showing of a reasonable probability of a more favorable result in these circumstances as well.

SAINTIGNON v. STATE, No. 18S02-0106-CR-308, ___ N.E.2d ___ (Ind. June 27, 2001).

SULLIVAN, J.

When an adult who has a prior juvenile record is convicted of a crime, how does that prior juvenile record affect the trial court's authority to suspend the sentence? That is the question presented by this case.

The Legislature has adopted a statute, Ind. Code § 35-50-2-2, which permits trial court judges to suspend the sentences of adult offenders. We will refer to this statute as the "General Suspension Statute." The General Suspension Statute restricts a trial court's authority to suspend a sentence when the offender has been convicted of certain specified offenses or has a prior adult criminal record of a specified nature. A separate statute, Ind. Code § 35-50-2-2.1, restricts a trial court's authority to suspend a sentence when the offender has a prior juvenile record of a specified nature. We will refer to this statute as the "Juvenile Record Suspension Statute." This case requires us to interpret the interrelationship of the General Suspension Statute and Juvenile Record Suspension Statute.

. . . .

Starting with the General Suspension Statute, subsection (a) sets forth the general rule that a court may suspend any part of the sentence for a felony, subject to restrictions imposed by either the General Suspension Statute itself or the Juvenile Record Suspension Statute. Subsection (b) of the General Suspension Statute sets forth two categories of restrictions. □□See footnote □□The first, contained in subdivisions (1)-(3), restrict the court's authority to suspend a sentence where the person has a prior adult criminal record

of a specified nature. We will refer to an offender who falls into this category as having a "disqualifying adult record." The second category, contained in clause (4), restrict the court's authority to suspend a sentence where the person has been convicted of a specific (extremely serious) offense. We will refer to an offender who falls into this category as having committed a "disqualifying adult offense."

It is extremely important to understand that the consequence of being an offender with a disqualifyi[redacted] record or [redacted]as committed a disqualifying adult offense is that the court may suspend only that part of the sentence that is in excess of the minimum sentence. Said differently, even when faced with a disqualifying adult record or a disqualifying adult offense, the court may still suspend that part of the sentence that is in excess of the minimum sentence.

Turning to the Juvenile Record Suspension Statute, we see that its subsection (a) is very similar to the disqualifying adult record provisions of subdivisions (1)-(3) of subsection (b) of the General Suspension Statute. It restricts the court's authority to suspend a sentence where the person has a prior juvenile record of a specified nature. We will refer to a person in this category as having a "disqualifying juvenile record."

The opening sentence of subsection (a) of the Juvenile Record Suspension Statute reads: "Except as provided in subsection (b) or section 2 of this chapter [the General Suspension Statute], the court may not suspend a sentence for a felony for a person with a juvenile record when" that person has a disqualifying juvenile record. Ind. Code § 33-50-2-2.1(a) (1998). The trial court and the Court of Appeals believed that this language precludes a trial court from suspending any portion of the sentence of an adult offender convicted of a felony who has a disqualifying juvenile record. Defendant argues, and we agree, that such a construction fails to read the Juvenile Record Suspension Statute in pari materia with the General Suspension Statute and also fails to give effect to the words "[e]xcept as provided in ... section 2 of this chapter."

It seems to us highly unlikely that the Legislature would authorize a trial court to suspend that part of the sentence that is in excess of the minimum sentence for a person convicted of, for example, Residential Entry who has a disqualifying adult record but prohibit the trial court from suspending that part of the sentence for that very same person if the person had, instead of a disqualifying adult record, a disqualifying juvenile record (like Defendant here). We think this is why the Legislature used the language "Except as provided in [the General Suspension Statute]" to specify that a trial court may not suspend a sentence for a person with a disqualifying juvenile record except to the extent that such a sentence may be suspended under the General Suspension Statute.

We believe that reading the General Suspension Statute and Juvenile Record Suspension Statute in pari materia and giving effect to the language in the Juvenile Record Suspension Statute, "[e]xcept as provided in" the General Suspension Statute, indicate that the Legislature intended that a trial court's authority to suspend a sentence in excess of the minimum sentence applies to persons with disqualifying juvenile records in the same way as to persons with disqualifying adult records.

. . . .

SHEPARD, C. J., and BOEHM, and RUCKER, JJ., concurred.
DICKSON, J., dissented with filing a separate written opinion.

AMWEST SURETY INSUR. CO. v. STATE, No. 20A03-0010-CR-363, ___ N.E.2d ___ (Ind. Ct. App. June 25, 2001).

SHARPNACK, C. J.

Amwest believed that Martinez had violated the conditions of his bond by moving without informing Amwest. Amwest called the Elkhart County Sheriff's Department ("the

Department") to inform the Department that it would be apprehending Martinez and returning him to the jail. A Department employee informed Amwest that, according to a new policy, the Department would not accept Martinez unless Amwest presented certified copies of the bail bond and an arrest warrant. The Department employee also told Amwest that if its employee apprehended Martinez and brought him to the jail without a certified arrest warrant, the Amwest employee could be charged with making a false arrest.

. . . .

We first address whether the Department's requirement of a certified arrest warrant was proper. This is a question of first impression for Indiana courts. To resolve it we must turn to the statutes on bail bonding, ...

At the common law, sureties were empowered to seize defendants without an arrest warrant and to return them to the authorities' custody. [Citation omitted.] However, our legislature has promulgated statutory guidelines applicable to sureties who seek to surrender defendants. The primary statute pertaining to surrendering defendants provides, in relevant part:

> (a) The person desiring to make a surrender of the defendant shall be provided a certified copy of the undertakings and a certified copy of the arrest warrant forthwith by the clerk of the court having jurisdiction and shall deliver them together with the defendant to the official in whose custody the defendant was at the time bail was taken or to the official into whose custody the defendant would have been given if committed, who shall detain the defendant in the official's custody thereon, as upon a commitment, and shall acknowledge the surrender in a written certificate.

Ind. Code § 27-10-2-6(a). This statute seems to require a surety to provide an arrest warrant whenever the surety surrenders a defendant to the authorities. However, Ind. Code § 27-10-2-7 provides:

> For the purpose of surrendering the defendant, the surety may apprehend the defendant before or after the forfeiture of the undertaking or may empower any law enforcement officer to make apprehension by providing written authority endorsed on a certified copy of the undertaking and paying the lawful fees therefor.

In addition, Ind. Code § 27-10-2-5(a) provides:

> (a) Any time before there has been a breach of the undertaking in any type of bail and cash bond, the surety may surrender a defendant, or the defendant may surrender, to the official to whose custody the defendant was committed at the time bail was taken or to the official into whose custody the defendant would have been given if committed.

Both statutes permit a surety to apprehend and surrender a defendant before the defendant violates the terms of the undertaking. Under those circumstances, it would be difficult to obtain an arrest warrant, and neither statute requires sureties to obtain such a warrant. At the same time, Ind. Code § 27-10-2-6(a) plainly provides that a surety must be provided with a certified copy of the arrest warrant, and must present that warrant to the authorities, in order to surrender the defendant. Thus, there appears to be a conflict among the three statutes.

The apparent conflict is resolved by turning to Ind. Code § 27-10-2-12(a). That statute provides, in relevant part:

> (a) If a defendant does not appear as provided in the bond:
>
> (1) the court shall:
>
> (A) issue a warrant for the defendant's arrest; and
>
> (B) order the bondsman and the surety to surrender the defendant to the court immediately; and
>
> . . . .

. . . Pursuant to this statute, an arrest warrant is issued when a defendant fails to appear, and the trial court sends an order to the surety and bonding agency to surrender the defendant. We read Ind. Code § 27-10-2-6(a)'s requirement that that a surety "shall be provided a certified copy of the undertakings and a certified copy of the arrest warrant" as referring to the process set forth in Ind. Code § 27-10-2-12(a). Thus, when a defendant has failed to appear in court, the trial court must issue an arrest warrant pursuant to Ind. Code § 27-10-2-12(a), and the surety must provide a certified copy of that warrant to the authorities when surrendering a defendant pursuant to Ind. Code § 27-10-2-6(a). However, when the surety seeks to surrender a defendant before the defendant has breached the terms of the undertaking, then Ind. Code §§ 27-10-2-5(a) and 27-10-2-7 apply, and the surety does not need to provide the authorities with an arrest warrant.

. . . .

KIRSCH, J., concurred.

MATTINGLY-MAY, J., filed a separate written opinion in which she concurred [on other issues].

CIVIL LAW ISSUE

R. R. DONNELLEY & SONS CO. v. NORTH TEXAS STEEL, INC., No. 43A03-99110CV-431, ___ N.E.2d ___ (Ind. Ct. App. June 21, 2001).

VAIDIK, J.

Frazier videotaped shelf beam connection tests for use during mediation. [Footnote omitted.] The video depicted a series of tests in which welds similar to the ones used in the RRD rack system were subjected to various amounts of weight in order to demonstrate their sufficiency. . . . Frazier presented the videotape to all parties during mediation. NTS offered the tape into evidence over RRD's contemporaneous objection at trial and prior objection in a motion in limine.

In particular, RRD alleges that the video should be excluded as a confidential settlement negotiation under Indiana Alternative Dispute Resolution Rule 2.12. [Footnote omitted.]

. . .Thus, we analyze this issue under the Indiana ADR Rule 2.12, in conjunction with Indiana Rule of Evidence 408. [Footnote omitted.] . . .

At the time of the mediation in this case, the Indiana ADR Rules [2.12] provided:

> . . . *Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in the course of mediation is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of the mediation process. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negating a contention of undue delay.* . . .

. . .

Rauch [*Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981)] attempted to argue that the report was admissible under the exception to Rule 408, which holds that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The Fifth Circuit concluded "clearly such an exception does not cover the present case where the document, or statement, would not have existed but for the negotiations, hence the negotiations are not being used as a device to thwart discovery by making existing

documents unreachable." [Citation omitted.] Thus, whether the trial court erred in the instant case by admitting the videotape turns on whether the videotape was produced solely for mediation. We find that it was.

. . . .

While the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations, this exception does not extend to the instant case where the videotape would not have existed but for the negotiations. Hence, the offering of the videotape during the settlement negotiations was not being used as a device to thwart discovery by making existing documents unreachable. Because we find that the videotape was prepared specifically for the settlement negotiations, and that to allow its use in any subsequent litigation would have a chilling effect on settlement discussions by subjecting opinions and research presented for the sole purpose of settlement negotiations to subsequent disclosure during any lawsuit that may ensue, we hold that the trial court erred by admitting such evidence over RRD's objections.

. . . .

Indiana Rule of Evidence 615(3) provides that a witness whose presence is shown to be essential to the presentation of the party's case cannot be excluded. This exemption most frequently is employed for expert witnesses, who are believed to be less susceptible to the temptation to shape their testimony. *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 629-30 (6th Cir. 1978); 1 GRAHAM HANDBOOK § 615.1, at 916 (4th ed. 1996). *See also Doe v. Shults-Lewis Child & Family Servs., Inc.,* 718 N.E.2d 738, 751 (Ind. 1999) (noting because of the similarity between the Indiana Rules of Evidence and the Federal Rules of Evidence federal case law interpreting the Federal Rules of Evidence may be of some utility, particularly with regard to the rules governing expert evidence). The party seeking a witness's exemption under Indiana Rule of Evidence 615(3) bears the burden of proving that the witness's presence is essential. [Citation omitted.] Indiana Rule of Evidence 615(3) provides no automatic exemption for experts; a party must request it. . . .

. . . .

Given the complexities of this case, it appears that the use of experts was essential. Also, in order to rebut any theory proffered by the defense, it would be necessary for the plaintiff's experts either to be present in the courtroom to witness the testimony or be provided with daily transcripts. However, RRD was denied such an opportunity. Thus, we find that the trial court abused its discretion by failing to exempt experts from the Separation Order, thereby hindering RRD's ability to respond to NTS's defense.

. . . .

KIRSCH and NAJAM, JJ., concurred.

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CASE CLIPS TRANSFER TABLE

June 29, 2001

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Owens Corning Fiberglass v. Cobb	714 N.E.2d 295 49A04-9801-CV-46	Defense should have received summary judgment as plaintiff showed only that he might have been exposed to its asbestos	01-19-00	
Lockett v. State	720 N.E.2d 762 02A03-9905-CR-184	Officer's question whether motorist had any weapons in the car or on his person impermissibly expanded a legitimate traffic stop	3-29-00	5-21-01. No. 02-S03-0004-CR-00232. Question regarding weapons was justified by safety concern and did not materially expand stop so as to violate Fourth Amendment; argument Indiana Constitution might have provided more protection was waived.
Fratus v. Marion Community School Board	721 N.E.2d 280 27A02-9901-CV-12	(1) Indiana Education Employment Relations Board (IEERB) did not have jurisdiction over teachers' claim against union for breach of its duty of fair representation, and (2) IEERB did not have jurisdiction over teachers' tort and breach of contract claims against school board	5-04-00	6-06-01. 27S02-0005-CV-295. Teachers required to exhaust IEERB administrative review remedy for claimagainst union; doctrine of primary jurisdiction required court to hold actions against board in abeyance pending IEERB decision.
McCarthy v. State	726 N.E.2d 789 37A04-9903-CR-108	Reversible error in teacher's sexual misconduct prosecution to prevent his cross-examination of child's mother about her filing notice of tort claim against school and possible intent to sue defendant personally.	6-08-00	
Zimmerman v. State	727 N.E.2d 714 77A01-9909-CV-318	Cases hold no appeal lies from a prison disciplinary action, but here inmate could bring a civil mandate action to compel DOC to comply with a clear statutory mandate.	8-15-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Felsher v. City of Evansville	727 N.E.2d 783 82A04-9910-CV-455	University was entitled to bring claim for invasion of privacy; professor properly enjoined from appropriating "likenesses" of university and officials; professor's actions and behavior did not eliminate need for injunction; and injunction was not overbroad..	8-15-00	
Dow Chemical v. Ebling	723 N.E.2d 881 22A05-9812-CV-625	State law claims against pesticide manufacturer, with exception of negligent design, were preempted by federal FIFRA pesticide control act; pest control company provided a service and owed duty of care to apartment dwellers, precluding summary judgment.	8-15-00	
Sanchez v. State	732 N.E.2d 165 92A03-9908-CR-322	Instruction that jury could not consider voluntary intoxication evidence did not violate Indiana Constitution	9-05-00	
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	
Poynter v. State	733 N.E.2d 500 57A03-9911-CR-423	At both pre-trials Court advised non-indigent defendant he needed counsel for trial and defendant indicated he knew he had to retain lawyer but was working and had been tired; 2nd pretrial was continued to give more time to retain counsel; trial proceeded when defendant appeared without counsel; record had no clear advice of waiver or dangers of going pro se - conviction reversed.	10-19-00	
Moberly v. Day	730 N.E.2d 768 07A01-9906-CV-216	Fact issue as to whether son-in-law was employee or independent contractor precluded a summary judgment declaring no liability under respondeat superior theory; and Comparative Fault has abrogated fellow servant doctrine.	10-24-00	
Shambaugh and Koorsen v. Carlisle	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.		

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
S.T. v. State	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion	10-24-00	
Tapia v. State	734 N.E.2d 307 45A03-9908-PC-304	Reverses refusal to allow PCR amendment sought 2 weeks prior to hearing or to allow withdrawal of petition without prejudice	11-17-00	
Tincher v. Davidson	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly	11-22-00	
Brown v. Branch	733 N.E.2d 17 07A04-9907-CV-339	Oral promise to give house to girlfriend if she moved back not within the statute of frauds.	11-22-00	
New Castle Lodge v. St. Board of Tx. Comm.	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	
Gallant Ins. Co. v. Isaac	732 N.E.2d 1262 49A02-0001-CV-56	Insurer 's agent had "inherent authority" to bind insurer, applying case holding corp. president had inherent authority to bind corp. to contract	11-22-00	
Reeder v. State	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Holley v. Childress	730 N.E.2d 743 67A05-9905-JV-321	Facts did not suffice to overcome presumption non-custodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error.	1-11-01	
Cannon v. Cannon	729 N.E.2d 1043 49A05-9908-CV-366	Affirms decision to deny maintenance for spouse with ailments but who generated income with garage sales	1-11-01	
City of New Haven v. Reichhart and Chemical Waste Mgmt. of IN	729 N.E.2d 600 99A02-9904-CV-247	Challenge to annexation financed by defendant's employer was exercise of First Amendment petition right and 12(B)(6) dismissal of city's malicious prosecution claim was properly granted.	1-11-01	No. 90S02-0101-CV-35, June 7, 2001. First Amendment issue not reached; case resolved on grounds taxpayer's action not subject to malicious prosecution suit since taxpayer's Open Door challenge was based on "probable cause."

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Davidson v. State	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences.	1-17-01	
Leshore v. State	739 N.E.2d 1075 02A03-0007-CR-234	(1) Writ of body attachment on which police detained defendant was invalid on its face for failure to include bail or escrow amount, and (2) defendant's flight from detention under the writ did not amount to escape.	1-29-01	
Rogers v. R.J. Reynolds Tobacco	731 N.E.2d 6 49A02-9808-CV-668	(1) trial court committed reversible error by making ex parte communication with deliberating jury, in which jury was advised that it could hold a press conference after its verdict was read, without giving notice to parties; (2) denial of plaintiff's motion for relief from judgment, which was based on public statements by director of one of manufacturers, was within court's discretion; (3) jury was properly instructed on doctrine of incurred risk; (4) evidentiary rulings were within court's discretion; and (5) leave to amend complaint was properly denied	2-09-01	
Mercantile Nat'l Bank v. First Builders	732 N.E.2d 1287 45A03-9904-CV-132	materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure	2-09-01	
State Farm Fire & Casualty v. T.B.	728 N.E.2d 919 53A01-9908-CV-266	(1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to $300,000 plus post-judgment interest on entire amount of judgment until payment of its limits.	2-09-01	
Merritt v. Evansville Vanderburgh School Corp	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-09-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
IDEM v. RLG, Inc	735 N.E.2d 290 27A02-9909-CV-646	the weight of authority requires some evidence of knowledge, action, or inaction by a corporate officer before personal liability for public health law violations may be imposed. Personal liability may not be imposed based solely upon a corporate officer's title.	2-09-01	
State v. Gerschoffer	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	
Healthscript, Inc. v. State	724 N.E.2d 265, *rhrg.* 740 N.E.2d 56249A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	
Vadas v. Vadas	728 N.E.2d 250 45A04-9901-CV-18	Husband's father, whom wife sought to join, was never served (wife gave husband's attorney motion to join father) but is held to have submitted to divorce court's jurisdiction by appearing as witness; since father was joined, does not reach dispute in cases whether property titled to third parties not joined may be in the marital estate.	3-01-01	
N.D.F. v. State	740 N.E.2d 574 49A02-0006-CR-383	Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two "prior unrelated delinquency adjudications"; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error	3-02-01	
Smith v. State	734 N.E.2d 706 49A02-0005-CR-300	Retaining defendant's DNA profile from a prior unrelated case and using it in new case no violation of state or federal Constitutions or of DNA database statute.	3-27-01	3-27-01. 744 N.E.2d 437. Retaining defendant's DNA profile from a prior unrelated case and using it in new case no violation of state or federal Constitutions. Retention not authorized by database statute, but lack of authorization not a basis for invoking exclusionary rule.
Robertson v. State	740 N.E.2d 574 49A02-0006-CR-383	Hallway outside defendant's apartment was part of his "dwelling" for purposes of handgun license statute.	3-09-01	
Bradley v. City of New Castle	730 N.E.2d 771 33A01-9807-CV-281	Extent of changes to plan made in proceeding for remonstrance to annexation violated annexation fiscal plan requirement.	4-06-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
King v. Northeast Security	732 N.E.2d 824 49A02-9907-CV-498	School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale.	4-06-01	
State v. Hammond	737 N.E.2d 425 41A04-0003-PC-126	Amendment of driving while suspended statute to require "validly" suspended license is properly applied to offense committed prior to amendment, which made "ameliorative" change to substantive crime intended to avoid supreme court's construction of statute as in effect of time of offense.	4-06-01	
Terrell v. State	745 N.E.2d 21982A049912-CR-537	Motion to set aside verdict filed after trial but prior to sentencing, based on newly discovered evidence, did not preserve issue for appeal, as motion to correct error was required.	4-11-01	745 N.E.2d 219. When evidence is discovered while case is still before trial court, either a pre-judgment motion to the court, as used here, or a post-judgment motion to correct error preserves issue for appeal.
Wilson v. State	727 N.E.2d 725	Patdown search justified prior to officer's placing motorist in police car to perform nystagmus screen test.	4-16-01	55D01-9901-CM-013. Putting driver in squad car so as to be able to make patdown search, when patdown would not otherwise be justified, violates 4th Amendment.
McCann v. State	742 N.E.2d 998 49A05-0002-CR-43	Photo array not improper; no prosecutorial misconduct; no error in attempted rape instruction; no error in sentencing refusal to rely on pregnancy of victim as not shown defendant knew of pregnancy.	4-12-01	
Dewitt v. State	739 N.E.2d 189	Trial court's failure to advise a defendant of his *Boykin* rights (trial by jury, confrontation, and privilege against self-incrimination) requires vacation of his guilty plea	4-26-01	
Pennycuff v. State	727 N.E.2d 723 49A02-9902-CR-117	Ineffective assistance for counsel to fail to object to State's references to defendants silences in response to police questions about entries on his calendar, when references violated *Doyle v. Ohio*		49S02-0104-CR-213. no *Doyle* violation to put in evidence of defendant's silences about calendar questions after defendant had presented evidence he cooperated fully with authorities, including answering calendar questions
Buchanan v. State	742 N.E.2d 1018 18A04-0004-CR-167	Admission of pornographic material picturing children taken from child-molesting defendant's home was error under Ev. Rule 404(b).		

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
McCary v. State	739 N.E.2d 193 49A02-0004-PC-226	Failure to interview policeman/probable-cause-affiant, when interview would have produced exculpatory evidence, was ineffective assistance of trial. Counsel on direct appeal was ineffective for noting issue but failing to make record of it via p.c. proceeding while raising ineffective assistance in other respects. Post-conviction court erred in holding res judicata applied under *Woods v. State* holding handed down after direct appeal..	5-10-01	
Equicor Development, Inc. v. Westfield-Washington Township Plan Comm.	732 N.E.2d 215 No. 29A02-9909-CV-661	Plan Commission denial of subdivision approval was arbitrary and capricious, notwithstanding it was supported by evidence, due to Commission's prior approvals of numerous subdivision having same defect.	5-10-01	
Progressive Insurance Co. v. General Motors	730 N.E.2d 218 56A03-9812-CV-534	Fires, which did not result in injury to any person, or damage to other property belonging to owners of vehicles, did not result in "physical harm" to the user or consumer or to the user or consumer's property, and thus could not provide basis for recovery under Indiana Products Liability Act	6-06-01	Products Liability Act does not permit recovery when claimed damage is to the defective product itself.
Martin v. State	744 N.E.2d 574 No 45A05-0009-PC-379	Finds ineffective assistance of appellate counsel for waiving issue of supplemental instruction given during deliberations on accomplice liability.	6-14-01	
Segura v. State	729 N.E.2d594 No. 10A01-9906-PC-218	Notes possible effect of Williams v. Taylor, 529 U.S. 362 (2000) on Indiana cases on ineffective assistance of counsel for failure to advise correctly of penal consequences of guilty plea, while affirming conviction.	6-05-01	6-26-01. No. 10S01-0009-PC-515. Assesses effect of federal decisions on Indiana caselaw and concludes "in the case of claims related to a defense or failure to mitigate a penalty, it must be shown that there is a reasonable probability that a more favorable result would have obtained in a competently run trial. However, for claims relating to penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead."
Catt v. Board of Comm'rs of Knox County	736 N.E.2d 341 (Ind. Ct. App. 2000)	County had duty of reasonable care to public to keep road in safe condition, and County's knowledge of repeated	6-14-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
	No. 42A01-9911-CV-396	washs-outs of culvert and its continued failure to repair meant that wash-out due to rain was not a "temporary condition" giving County immunity.		
Ind. Dep't of Environmental Mgt. v. Bourbon Mini Mart, Inc.	741 N.E.2d 361 No. 50A03-9912-CV-476	(1) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against automobile dealership; (2) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against gasoline supplier pursuant to pre-amended version of state Underground Storage Tank (UST) laws; (3) amendment to state UST laws, which eliminated requirement that party seeking contribution toward remediation be faultless in causing leak, did not apply retroactively so as to allow contribution for response costs that were incurred before its effective date; and (4) third-party plaintiffs' action against gasoline supplier to recover ongoing remediation costs was not time barred.	6-14-01	